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No. 98-68

In the Supreme Court of the United States

OCTOBER TERM, 1997

CYNTHIA M. STONER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether an indictment charging a conspiracy under 18 U.S.C. 371 must allege a specific overt act committed within the limitations period.

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OPINIONS BELOW

The order of the court of appeals sitting en banc (Pet. App. 44a-45a) is reported at 139 F.3d 1343. The opinion of a panel of the court of appeals (Pet. App. 1a-20a) is reported at 98 F.3d 527.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on April 7, 1998. The petition for a writ of certiorari was filed on July 6, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of conspiring to embezzle and convert to her own use money belonging to the Ponca Indian Tribe, in violation of 18 U.S.C. 371. She was sentenced to 12 months' imprisonment, to be followed by three years of supervised release, and ordered to pay restitution in the amount of $19,200. The court of appeals affirmed.

1. Petitioner is a member of the Ponca Indian Tribe. In 1988 and 1989 she chaired the Ponca Tribal Business Committee, a position that enabled her to supervise and control the Tribe's financial affairs. Petitioner's co-conspirator, Ledavie Rhodd, was Secretary-Treasurer of the Tribe during the same time period. Both petitioner and Rhodd were authorized signatories for two tribal bank accounts. Between March 1988 and August 1989, Rhodd, on instructions from petitioner, wrote 25 checks made out to herself or to "cash" on accounts containing funds for the Tribe's loan and burial programs. Petitioner and Rhodd thus obtained approximately $25,000 in cash, which they split between themselves. Petitioner signed eight of the 25 checks and decided how to split the proceeds. Pet. App. 2a-3a; Gov't C.A. Br. 2-6.

On March 16, 1994, a federal grand jury indicted petitioner on one count of conspiracy to embezzle and convert monies belonging to the Ponca Indian Tribe, in violation of 18 U.S.C. 371, and three counts of embezzlement and conversion of funds belonging to a federally recognized Tribe, in violation of 18 U.S.C. 1163. The indictment alleged that the conspiracy began "in or about March 1988" and "continu[ed] thereafter until in

or about August 1989." Pet. App. 40a, ¶ 4. The indictment also alleged that petitioner and others had committed "various overt acts * * * including, but not limited to," five specified acts in furtherance of the conspiracy. *Id.* at 41a. The most recent overt act specifically set out in the indictment was alleged to have occurred on March 13, 1989, five years and three days before the indictment was returned. *Ibid.* The substantive counts of the indictment alleged more recent acts of embezzlement by petitioner, but the conspiracy count did not expressly incorporate those acts by reference. See *id.* at 42a-43a.

After the jury was impaneled, petitioner moved to dismiss the conspiracy count, contending that the indictment was facially defective because it did not allege an overt act that occurred within the five-year limitations period established by 18 U.S.C. 3282. Pet. App. 35a. In making the motion, petitioner's counsel noted that, although he could have raised the issue earlier, he "didn't want to do [so] until we had a jury." *Id.* at 30a. The district court noted that the motion was "raised * * * late," but it took the matter under advisement. *Id.* at 31a. The court later denied the motion. *Id.* at 32a.

At trial, Rhodd testified that petitioner was in charge of the embezzlement scheme, instructing her (Rhodd) when to cash checks drawn on the loan and burial accounts and how to divide the proceeds. Pet. App. 6a. Petitioner admitted that she signed some of the checks that were cashed. *Ibid.* Evidence linked petitioner's cash deposits to the checks cashed by Rhodd, who testified that she began cashing checks drawn from the loan and burial accounts in March 1988 and continued to do so until August 1989. *Ibid.* For example, petitioner deposited $400 into her checking account on June 7,

1989, the day after Rhodd cashed a check for $1,450. *Ibid.*; Gov't C.A. Br. 19.

The district court instructed the jury that, to find petitioner guilty of coconspiracy, it must find, among other things, that "one of the coconspirators * * * knowingly committed at least one of the overt acts charged in the Indictment, at or about the time and place alleged." See Pet. 12 (emphasis omitted). The court further instructed that "the overt act element is satisfied if the government proves that at least one of the overt acts charged in the Indictment was knowingly committed by one of the coconspirators." See Pet. 13 (emphasis omitted). Petitioner's trial counsel did not object to these instructions, or ask that the jury be instructed that it must find that at least one act was committed within the limitations period. See Tr. 235, 237. The jury found petitioner guilty of conspiracy, but acquitted her on the embezzlement counts. Pet. App. 3a.

2. A panel of the court of appeals affirmed. Pet. App. 1a-29a. The panel first rejected petitioner's claim that the evidence was insufficient to sustain her conspiracy conviction. *Id.* at 4a-6a.[1] Reviewing the evidence in the light most favorable to the government, the court "conclude[d] that reasonable factfinders could have found [petitioner] guilty beyond a reasonable doubt on the conspiracy charge against her." *Id.* at 5a; see *id.* at 5a-6a.

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[1] The court noted that petitioner had failed to include the entire trial transcript in the record on appeal, and that it could therefore decline to consider her sufficiency claim. Pet. App. 4a. Because supplemental record materials supplied by the government made it possible to review the claim, however, the court "exercise[d] [its] discretion to consider" it on the merits. *Ibid.*

The panel also rejected petitioner's argument that the conspiracy indictment against her was insufficient because it failed to allege the commission of a specific overt act within the applicable limitations period. Pet. App. 7a-20a. Although it agreed with petitioner that "an indictment lacking any allegation that the conspiracy offense was committed within the limitations period" would infringe the defendant's Fifth and Sixth Amendment rights (*id.* at 10a), the panel observed that the indictment in this case both described the charged conspiracy as "continuing * * * until in or about August 1989" and expressly alleged the commission of overt acts "including, but not limited to," those specifically described in the indictment, *id.* at 12a (quoting indictment) (court's emphasis omitted). Because the indictment alleged both that "overt acts other than the untimely ones listed * * * were committed in furtherance of the conspiracy" and that the "conduct constituting the conspiracy occurred within the statute of limitations period," the panel concluded that the indictment was "not subject to dismissal on its face." *Id.* at 11a-13a; see *id.* at 13a nn.4-5.

Although the panel rejected petitioner's facial challenge to the indictment, it agreed with her that overt acts associated with the indictment's substantive counts were not implicitly incorporated in the conspiracy count, and that accordingly "there was a variance between the overt acts alleged in the [conspiracy] indictment and the overt acts proven at trial." Pet. App. 16a. The panel held, however, that petitioner had "failed to establish that the variance * * * prejudiced her substantial rights in any way." *Id.* at 19a; see *id.* at 16a-20a. In particular, the panel noted that petitioner had never moved for a bill of particulars, claimed unfair surprise at the nature of the overt acts proved at trial,

argued that any variance put her in danger of double jeopardy, or alleged that the specification of particular overt acts in the indictment created a risk that her conspiracy conviction was based on legally insufficient grounds. *Id.* at 19a-20a. Accordingly, the panel held that the district court had properly denied petitioner's motions to dismiss the conspiracy count or for a judgment of acquittal. *Id.* at 20a.

Judge Briscoe dissented. Pet. App. 20a-29a. Relying on cases from the Fifth and Eleventh Circuits, she would have held that "for statute of limitations purposes, an indictment charging a conspiracy violation under § 371 must allege at least one [specific] timely overt act in furtherance of the conspiracy." *Id.* at 25a. Because she also rejected the government's argument that the overt acts charged in the substantive embezzlement counts of the indictment were implicitly incorporated in the conspiracy count, she would have held that the conspiracy charge against petitioner was barred by the statute of limitations. *Id.* at 27a-29a.

3. The court of appeals accepted petitioner's suggestion that it rehear en banc the question whether an indictment charging a conspiracy under 18 U.S.C. 371 must allege at least one specific overt act occurring within the period of limitations. See Pet. App. 45a. On rehearing, the full court divided evenly on that question. *Ibid.* The court accordingly issued a brief per curiam order, affirming petitioner's conviction, but noting that the portion of the panel opinion addressing the question on which rehearing had been granted would have no precedential effect. *Id.* at 44a-45a. The en banc order left "undisturbed" that portion of the panel's opinion that held that the evidence at trial was sufficient to support petitioner's conviction. *Id.* at 45a.

ARGUMENT

1. Petitioner argues primarily (Pet. 4-12) that the Court should grant review because the panel opinion in this case creates a conflict among the circuits on the question whether an indictment that charges a violation of 18 U.S.C. 371 must allege the commission of a specific overt act, in furtherance of the charged conspiracy, during the applicable limitation period. The panel opinion cannot create a conflict on that question, however, because the order later issued by the full court, sitting en banc, expressly deprives the relevant portion of the panel opinion of any precedential effect. Pet. App. 45a.[2] Thus, neither the panel's discussion nor the final judgment in this case binds any district court or later panel in the Tenth Circuit on the statute-of-limitations issue. The judgment below accordingly creates no conflict in the law, and it does not warrant review by this Court.[3]

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[2] The full court's order states that the relevant portion of the panel opinion is "without precedent." The court's citations to *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 263-264 (1960) (opinion of Brennan, J.), and *United States* v. *Rivera*, 874 F.2d 754 (10th Cir. 1989), make clear that affirmance of the panel's judgment by an equally divided vote leaves the court's judgment, and the panel's discussion of the issue, "without force as precedent." *Price*, 364 U.S. at 264 (opinion of Brennan, J.).

[3] Petitioner also cites (Pet. 8-9) *United States* v. *Read*, 658 F.2d 1225 (7th Cir. 1981). As petitioner notes, however, the relevant portion of the *Read* opinion focused on the claim of one defendant, in a multi-defendant conspiracy case, that he had withdrawn from the conspiracy more than five years before the indictment was filed. See 658 F.2d at 1231. Having concluded that the defendant must be retried because the jury might have thought that the defendant bore the ultimate burden of proof on the issue of withdrawal (*id.* at 1231-1239), the court of appeals briefly rejected a further challenge to the trial court's withdrawal

Moreover, although petitioner now challenges the facial sufficiency of the indictment returned against her, she did not raise that issue in a timely manner during the course of ordinary pre-trial proceedings, as required by Rule 12(b)(2) of the Federal Rules of Criminal Procedure. The requirement of timely objection serves, among other things, to protect the government's ability to remedy any formal defect by procuring a superseding indictment, on the basis of which the trial may go forward. See Fed. R. Crim. P. 12(h); *United States* v. *Oldfield*, 859 F.2d 392, 397 (6th Cir. 1988). Petitioner's counsel, by contrast, candidly admitted to the district court that he deliberately waited to raise his challenge to the indictment until after the jury had been selected and sworn, Pet. App. 30a, presumably in an effort to preclude the government from correcting any defect that the court might agree existed. That tactical decision has resulted in three judicial rulings on a legal issue that could have been completely avoided had the objection been timely made. There is no merit to petitioner's request for further review.

2. In any event, there is no reason to disturb the court of appeals' order affirming petitioner's conviction. Petitioner was charged with a conspiracy to embezzle

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instructions with the observation that "[a]cts not alleged in the indictment may be proved to show [the defendant's] participation [in the conspiracy] within the statute of limiations" (*id.* at 1239). *Read* did not discuss the facial sufficiency of the portion of the indictment at issue, and its reversal of the defendant's conviction rested on other grounds. Whatever tension may exist between the Seventh Circuit's statement in *Read* and the Fifth Circuit's opinion in *United States* v. *Davis*, 533 F.2d 921, 926 (1976), it provides insufficient grounds for review of the Tenth Circuit's judgment here, which creates no precedent concerning the facial sufficiency of the indictment in this case.

and convert funds belonging to a federally recognized Indian Tribe, in violation of 18 U.S.C. 371.[4] Petitioner contends, not that the indictment failed to give her proper notice of the crime with which she was charged, but that it failed to allege a specific overt act committed within the five years allowed by the applicable statute of limitations. 18 U.S.C. 3282. Failure to indict within the limitation period is an affirmative defense to criminal liability, not a ground for challenging the facial validity of an indictment or the jurisdiction of the district court. *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 177-181 (1872); see *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917).[5] Even if, however, an indictment were facially insufficient if it failed to allege that the crime charged was committed within the limitations period, petitioner would not prevail. The indictment in this case expressly alleged that the conspiracy in question continued "[f]rom in or about March 1988, * * * until in or about August 1989." Pet. App. 40a, ¶ 4. Because the indictment was returned in March 1994 (*id.* at 39a), within five years of the end of the conspiracy as described in the indictment, its temporal allegations were sufficient to defeat a facial challenge on statute-of-limitations grounds. Compare *United States* v. *Barber*, 219 U.S. 72, 77-78 (1911) (rejecting similar facial challenge to conspiracy indict-

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[4] The object of the conspiracy—embezzlement and conversion of tribal funds—violates 18 U.S.C. 1163.

[5] See also, *e.g.*, *United States* v. *Del Percio*, 870 F.2d 1090, 1093 (6th Cir. 1989); *United States* v. *Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987); *United States* v. *Walsh*, 700 F.2d 846, 855-856 (2d Cir. 1983); but cf. *United States* v. *Cooper*, 956 F.2d 960, 961 (10th Cir. 1992) (application of statute of limitations was not waived where it was raised "as soon as its applicability was evident to anyone," although guilty plea had already been accepted).

ment); *United States* v. *Kissel*, 218 U.S. 601, 606-607, 609-610 (1910) (same).[6]

This Court has held that if a conspiracy statute requires proof of an overt act, the statute of limitations typically runs from the accomplishment of the object of the conspiracy or (what is often much the same thing) "from the last overt act during the existence of the conspiracy." *Fiswick* v. *United States*, 329 U.S. 211, 216 (1946); see *Grunewald* v. *United States*, 353 U.S. 391, 396-397 (1957); *Brown* v. *Elliott*, 225 U.S. 392, 400-401 (1912); 2 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 6.5 (1986). There is, accordingly, no question that the government was required to prove, at trial, the commission of an overt act within the applicable limitation period. See Pet. App. 6a; compare *Kissel*, 218 U.S. at 609-610 (rejecting facial statute-of-limitations challenge to indictment charging continuing conspiracy, but noting that satisfaction of statute would still be subject to proof at trial). Nor is there any question that petitioner was entitled to raise her statute-of-limitations defense in a proper pretrial motion, see Fed. R. Crim. P. 12(b), and that the court could have accepted that defense if the facts did not raise a triable issue concerning the commission of a timely overt act. This Court has never held, however, that an indictment that charges a conspiracy that continued into the limitations period is subject to dismissal, *on its*

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[6] *Kissel* involved a criminal conspiracy under the Sherman Act. Although this Court later held that conviction of such a conspiracy does not require proof of an overt act, see *Nash* v. *United States*, 229 U.S. 373, 378 (1913), that circumstance would not have changed the analysis in *Kissel*.

face, because it fails to allege a *specific* overt act committed within the limitations period.[7]

As the panel majority observed (Pet. App. 19a-20a), petitioner has never demonstrated any unfairness resulting from the fact that the indictment did not allege, in the conspiracy count itself, any specific overt act performed within the limitations period. Petitioner never sought a bill of particulars; she has never claimed that she was unfairly surprised by the proof of timely overt acts offered by the government at trial; and she has never suggested that the language of the indictment left any doubt about the crime with which she was charged, or about her ability to plead this indictment and trial in bar against any subsequent prosecution for the same offense. See *ibid.* And, as the court of appeals held, the evidence at trial plainly showed at least one overt act, in furtherance of the conspiracy, committed within the period of limitations. *Id.* at 6a; see *id.* at 45a (leaving this portion of the panel opinion "undisturbed"). Under those circumstances, and in the

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[7] As the panel majority in this case recognized, any such holding would run counter to the rule that the government may substantiate a conspiracy charge by proving at trial an overt act that was not alleged in the indictment. See Pet. App. 8a (citing cases); *United States* v. *Schurr*, 794 F.2d 903, 907 n.4 (3d Cir. 1986) (given that the government can prove overt acts not listed in the indictment, "[t]here would appear to be no reason that the government could not satisfy its requisite showing under the statute of limitations by means of an overt act not listed in the indictment."); but see *Brown*, 225 U.S. at 401 (dictum) (quoting lower-court opinion to effect that limitation period runs from date of last overt act of which there is appropriate "allegation and" proof); *United States* v. *Davis*, 533 F.2d 921, 926 (5th Cir. 1976) (government "must allege and prove the commission of at least one overt act by one of the conspirators within that period in furtherance of the conspiratorial agreement.").

absence of any conflict among the courts of appeals or with a decision of this Court, petitioner's case does not warrant further review.

3. Although the petition sets out only a single question presented (Pet. i), petitioner also argues (Pet. 12-15) that her conviction should be reversed because the trial court's instructions to the jury concerning the conspiracy charge required, or at any rate permitted, the jury to consider only those overt acts specifically charged in the indictment, all of which occurred outside the limitations period. Petitioner did not object to the relevant instructions at trial, or challenge them in her opening or reply briefs to the court of appeals. See Pet. App. 20a (noting that petitioner did not include the jury instructions as part of the record on appeal). She raised her present argument for the first time in her supplemental brief on rehearing in banc (at 10-13). Because petitioner did not adequately present below the issue she now seeks to raise, and the court of appeals did not pass on it (see Pet. App. 44a-45a), the question is not properly presented to this Court on certiorari. See, *e.g.*, *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

In any event, petitioner did not object to the relevant instructions at trial; accordingly, she must now argue that any error that occurred is plain, affected her substantial rights, and would seriously affect the fairness, integrity, or public reputation of judicial proceedings. See Fed. R. Crim. P. 30, 52(b); *Johnson* v. *United States*, 117 S. Ct. 1544, 1548-1550 (1997); *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993). Petitioner observes (Pet. 12-13) that the instructions in this case would theoretically have permitted a guilty verdict

based only on one of the untimely overt acts charged in the indictment. The possible absence of a jury finding of a timely overt act does not, however, constitute plain error. As the court of appeals held (Pet. App. 6a, 45a), the government's evidence was sufficient to support the conclusion that petitioner and her co-conspirator committed overt acts within the applicable limitation period. In light of that evidence, petitioner cannot demonstrate that the failure to reverse her conviction would result in a miscarriage of justice or otherwise satisfy the stringent requirements of plain-error review. See *Johnson*, 117 S. Ct. at 1549-1550 (failure to submit one element of the offense to the jury not plain error in light of strength of evidence on that element); *United States* v. *Matzkin*, 14 F.3d 1014, 1018 (4th Cir. 1994) ("A finding of plain error when a court failed to sua sponte include an instruction relating to an affirmative [statute-of-limitations] defense would place an unnecessary and intolerable burden upon the trial court.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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